Office Supreme Court, U.S.
FILED
APR 20 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.
No. 896

BASIC TOOL INDUSTRIES, INC.,

Petitioner,

vs.

C. DOUGLAS WIKLE, Trustee,

Respondent.

Petition for Writ of Certiorari to Review Decision of United States Court of Appeals for the Ninth Circuit.

J. ROBERT ARKUSH,
416 West Eighth Street,
Los Angeles 14, California,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Petition for writ of certiorari to review decision of United States Court of Appeals for the Ninth Circuit 1

Appendices:

Appendix "A." Opinion of the United States Court of Appeals for the Ninth Circuit 1

Appendix "B." Judgment 8

Appendix "C." Notice of intended mortgage under Section 3440 Civil Code of the State of California 9

Appendix "D." Mortgage of chattels 10

TABLE OF AUTHORITIES CITED

CASES	PAGE
Basic Tool Industries, Inc. v. Wikle, Trustee, ... F. 2d	2
Booth v. Bond, 56 Cal. App. 2d 153	8
Bumb v. United States, 276 F. 2d 729	7, 9, 10, 11
Constance v. Harvey, 215 F. 2d 57	12
First National Bank v. Kinslow, 2 Cal. App. 2d 456	8
Lewis, Trustee in Bankruptcy v. Manufacturers National Bank of Detroit, 364 U. S. 603	12
Mahana v. Van Alstyne, 179 Cal. 725	8
Nesbitt Fruit Products, Inc. v. Del Monte Beverage Co., 177 Cal. App. 2d 353	8
Sousa v. First California Co., 101 Cal. App. 2d 534	9
Stewart v. Leasure, 12 Cal. App. 2d 652	12
Strain v. Security Title Insurance Co., 124 Cal. App. 2d 195	9
Whelan v. Swain, 132 Cal. 387	8

STATUTES	
Bankruptcy Act, Sec. 24c	3
Bankruptcy Act, Sec. 70e(1)	4
California Civil Code, Sec. 1605	8
California Civil Code, Sec. 1615	8
California Civil Code, Sec. 3440.1	3, 5, 6, 7, 8, 10, 11, 12
United States Code, Title 11, Sec. 47	3
United States Code, Title 11, Sec. 110e(1)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. .....

BASIC TOOL INDUSTRIES, INC.,

Petitioner,

vs.

C. DOUGLAS WIKLE, Trustee,

Respondent.

Petition for Writ of Certiorari to Review Decision of United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States of America, and to the Honorable the Associate Justices of the Supreme Court of the United States:

The Petition of Basic Tool Industries, Inc.,[1] a California corporation, for a Writ of Certiorari to be directed to the United States Court of Appeals for the Ninth Circuit to review a judgment of that Court entered on the 6th day of December, 1961; rehearing denied on the 23rd day of January, 1962, in favor of respondent and against petitioner, respectfully shows:

[1]Petitioner changed its corporate name from "Basic Tool Industries, Inc." to "Basic Industries, Inc." effective as of November 1, 1961.

(1) The case was initiated by a Petition to the Honorable District Court of the United States for the Southern District of California, Central Division, for review of the Findings of Fact, Conclusions of Law and Order of the Referee in Bankruptcy to whom an involuntary petition in bankruptcy against Jet Air-Age, Inc., a California corporation, had been referred and by whom the respondent trustee in bankruptcy had been appointed. Said District Court subsequently issued its Order affirming said Order of the Referee in Bankruptcy and from that Order of the District Court petitioner filed an appeal in the United States Court of Appeals for the Ninth Circuit. Said bankrupt was the chattel mortgagor of the chattel mortgage in question and petitioner was the chattel mortgagee.

(2) The United States Court of Appeals for the Ninth Circuit in an opinion filed on December 6, 1961 affirmed the Order of the District Court which had affirmed the Order of the Referee holding the chattel mortgage to be invalid. Thereafter, on January 23, 1962, said Court of Appeals denied this petitioner's Petition for Rehearing. The opinion of the Court of Appeals is reported as *Basic Tool Industries, Inc. v. Wikle, Trustee* (C. A. 9, 1961), ... F. 2d ....., and is set forth in Appendix "A" to this Petition.

(3) The grounds on which the jurisdiction of this Court is invoked are as follows:

(a) The judgment of the Court of Appeals sought to be reviewed was dated and entered December 6, 1961.

(b) An Order of the Court of Appeals denying petitioner's Petition for Rehearing was made on January 23, 1962 which Order provided that petitioner herein had 90 days thereafter in which to file a Petition for Certiorari in this Court.

(c) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question of the Court of Appeals is Section 24c of the Bankruptcy Act, 11 U. S. C. Sec. 47.

(4) *The basic question presented for review* is whether the federal courts in a bankruptcy matter can construe and apply an applicable state statute in a manner wholly at variance with established state law.

The statute in question, Section 3440.1 of the California Civil Code (quoted below) provided that the notice of intended chattel mortgage should specify the date and place where the "consideration is to be paid." (That language remains unchanged.) State law has authoritatively established that "consideration" and "payment of consideration" is not limited to cash or cash payment but applies to anything of value. (See authorities cited in petitioner's argument, *infra.*)

The Court of Appeals, in flagrant disregard of state law, takes the position that the statutory language "consideration is to be paid" is limited to cash consideration. That Court thus declares invalid as against a trustee in bankruptcy a chattel mortgage otherwise admittedly valid because the "consideration" which was "paid" consisted in part of cash and in part of the satisfaction of pre-existing promissory notes. The effect of such an interpretation on uncounted security transactions entered into in good faith and in compliance with state law is both shocking and frightening.

(5) *The statutes which the case involves*, and their terms, are as follows:

(a) California Civil Code Sec. 3440.1:

". . . the sale, transfer, assignment, or mortgage of

the fixtures or store equipment of a . . . machinist . . . is conclusively presumed fraudulent and void as against the existing creditors of the . . . mortgagor, unless before the consummation of the . . . mortgage . . . the mortgagor, or the intended . . . mortgagee does all of the following:

"(a) Records at least 10 days before the consummation of the . . . mortgage . . . a notice of the intended . . . mortgage, which states the name and address of the intended . . . mortgagor and the name and address of the intended . . . mortgagee. The notice shall contain a general statement of the character of the merchandise or property intended to be . . . mortgaged, and show the date and place where *the purchase price or consideration is to be paid.*" (Emphasis added.)

(b) Bankruptcy Act, Sec. 70e(1), 11 U. S. C. Sec. 110e(1):

"A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor."

(6) *Statement of the Case:* The facts in the case are generally undisputed. On August 22, 1958, a petition in bankruptcy was filed against Jet Air-Age, Inc., the bankrupt involved herein. Prior to that time the bankrupt was engaged in the machine shop business. Among the assets of the bankrupt taken into possession by the respondent trustee in bankruptcy were various

items of machinery, equipment, fixtures, etc., which were the subject of and described in a chattel mortgage which had been executed in favor of petitioner. During the period from February 19, 1958, to August 5, 1958, petitioner made various loans to the bankrupt which are material herein, as follows:

Dates	Amounts
February 19, 1958	$ 500.00
February 20, 1958	500.00
March 7, 1958	500.00
March 14, 1958	23,500.00
March 28, 1958	5,000.00
March 28, 1958	5,000.00
June 9, 1958	10,000.00
June 12, 1958	4,700.00
June 20, 1958	3,300.00
August 5, 1958	3,000.00

The advances made prior to March 28, 1958, were originally evidenced by demand notes executed by the bankrupt. The chattel mortgage transaction in question was consummated by means of an escrow held in a designated place. As part of the escrow transaction the bankrupt's *new, installment* note dated March 28, 1958, in the sum of $25,000.00, was substituted for its previous *demand* notes representing prior advances also totalling $25,000.00. It was the intention of the parties that the chattel mortgage was to secure all advances made by petitioner to the bankrupt, but not to exceed the maximum indebtedness set forth in the chattel mortgage.

A Notice of Intended Chattel Mortgage, as required by California Civil Code Sec. 3440.1, was published and recorded. The notice recited that the chattel mort-

gage would be delivered "and the consideration therefor paid at 10:00 o'clock A.M. on the 28th day of March, 1958" at the specified office. An additional $10,000.00 was advanced to the bankrupt on March 28, 1958. That sum and the new promissory note (which was an installment note specifying deferred installment payments as distinguished from the demand notes which it replaced) were delivered to the bankrupt at approximately 10:15 A.M. on that date, at the place specified in the Notice.[2]

The trustee in bankruptcy filed a Petition addressed to the Referee in Bankruptcy asking that the chattel mortgage be declared invalid because the transaction was not consummated in a manner complying with the terms of the Notice of Intention, as required by California Civil Code Sec. 3440.1. It was the granting of such an order and the affirming of it on appeal that led to the present Petition.

(7) *Argument in Support of Petition:* It is petitioner's basic contention that the Court of Appeals has decided an important state question in a manner which conflicts with the applicable law of the state involved, California. The case arose in a bankruptcy matter and the principal statute involved is that of the state in which the bankruptcy court was sitting, not a statute of the United States. However, the state statute in question is one which is frequently involved in bankruptcy cases, since it deals with the rights of creditors, to which the trustee in bankruptcy succeeds, to avoid the priority of chattel mortgages executed by the bankrupt. Transactions of the type involved in this

[2]The Court of Appeals expressly did not base its decision on the time variance from 10:00 A.M. to 10:15 A.M. (See Note 3 to that Court's opinion.)

case have been common in California for many years and the effect of the decision of the Court of Appeals in this case and of its own previous decision in *Bumb v. United States* (C. A. 9, 1961), 276 F. 2d 729, on which it relies in its decision in this case, has had, and continues to have, serious implications in an enormous volume of credit transactions, both private and institutional, in the State of California.

California Civil Code Section 3440.1, the California codification of its Bulk Sales Law, requires that a notice of the intended chattel mortgage be recorded within a specified time and published in a specified manner in a newspaper of general circulation. It is undisputed that both steps were carried out in the proper manner and within the proper time. The notice involved herein is set forth verbatim in Appendix "C" of the Court of Appeals. The only question is whether the notice complied with the provisions of the statute with respect to the nature of the consideration to be paid.

The Notice of Intended Mortgage stated that the "consideration" would be "paid" on March 28, 1958. The chattel mortgage, which is set forth verbatim in Appendix "D," provided that it was security for a promissory note on $25,000.00 and future advances of up to $50,000.00. It is undisputed that $25,000.00 *in cash* was not transferred on the specified date. Rather, what occurred on that date was that, pursuant to the previous intention of the parties, four existing *demand* promissory notes were cancelled and were simultaneously replaced by one new *installment* promissory note. That such a transaction generates fresh consideration of a type sufficient to support the contracts involved and that "consideration" can be "paid" other than in cash is thorough-

ly established by applicable state law, as indicated below.

Civil Code Section 3440.1 itself does not require that the "consideration" for the chattel mortgage be cash or that the nature or amount thereof be stated in the notice. California Civil Code Section 1605, enacted in 1872 and not amended since, defines consideration as follows: "Any benefit conferred, or agreed to be conferred, upon the promissor by any other person, to which the promissor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer as an inducement to the promissor, is a good consideration for a promise." The definition nowhere mentions or implies that "consideration" need be in the form of money. (Section 1615 of that Code proves that "The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.")

The cancellation of existing demand notes and their replacement by a new, installment note secured by a chattel mortgage certainly is a transaction supported by new consideration. (*Whelan v. Swain*, 132 Cal. 387, 391; *First National Bank v. Kinslow*, 2 Cal. App. 2d 456, 457; *Mahana v. Van Alstyne*, 179 Cal. 725, 726; *Booth v. Bond*, 56 Cal. App. 2d 153, 157; *Nesbitt Fruit Products, Inc. v. Del Monte Beverage Co.*, 177 Cal. App. 2d 353, 361.)

The statutory requirement that the notice of intention show the date and place where the consideration is to be "paid" does not necessarily mean that the consideration must be *money*, as is indicated by the dictum

in the *Bumb* case. It is well established in California that payment may take place by the delivery and acceptance of other things of value instead of money. (*Sousa v. First California Co.*, 101 Cal. App. 2d 534, 540; *Strain v. Security Title Insurance Co.*, 124 Cal. App. 2d 195, 200.)

Thus it would seem that there was "consideration", that it was "paid" within the meaning of the statute and that the notice stating when and where the "consideration" would be "paid" fully complied with the statute. However, in this regard the opinion of the Court of Appeals, states as follows:

> "The notice of intended mortgage stated that the consideration would be paid on March 28, 1958. However, in fact the $25,000 was not transferred on the specified date. The bankrupt did not receive $25,000 in cash on that day; rather, it received only $10,000 in cash and the return of four unsecured notes totaling $25,000. Thus, the consideration was not paid in the manner and mode set out in the notice of intended chattel mortgage."

We submit that this interpretation of the Notice of Intended Mortgage in this case and of the decision in *Bumb v. United States, supra*, as applied to this case by the Court of Appeals are completely inconsistent with the plain language contained in that Notice and with the law of the State of California, and that those interpretations do great violence to the rights of those engaged in security transactions in California and perhaps elsewhere.

The portion of its decision in *Bumb v. United States, supra*, upon which the Court of Appeals relied in its opinion in this case reads as follows:

"Appellee [the chattel mortgagee] contends that the payment of the consideration was substantially in accordance with the recorded notice. We cannot agree with such contention. The notice stated that the consideration for said chattel mortgage is to be paid on the 21st day of November, 1956. The undisputed fact is that only 58½ per cent of the consideration to be paid was paid on that date. 21½ per cent of the consideration was paid 37 days later by government warrant made payable jointly to the mortgagor and one of its creditors. 20 per cent of the consideration was paid 44 days late. Appellee argues that the recorded notice did not represent that the entire $10,000 would be paid on November 21, 1956, nor did it specify the kind or amount of consideration to be paid. It is undisputed that the consideration to be paid for the chattel mortgage was $10,000. The notice stated that the consideration would be paid on the 21st day of November, 1956. The only reasonable interpretation which can be placed on the notice is that the entire consideration to be paid would be paid in lawful money of the United States on November 21, 1956. If the consideration to be paid was to be paid in installments the notice should have so stated, and if the consideration was to be other than lawful money of the United States the notice should likewise have so stated."

Obviously, in the *Bumb* case the requirements of Section 3440.1 were not met, and the spirit of the law, which was intended to protect creditors of the chattel mortgagor, as well as its letter, were violated. A simple statement to that effect would have disposed of that phase of the case. We submit that the statement

in the opinion that "the only reasonable interpretation which can be placed on the notice is that the entire consideration to be paid would be paid in lawful money of the United States on November 21, 1956" is based only on an interpretation of the specific facts of the *Bumb* case, or that it is a pure *dictum*, since the notice itself contained no such statement. Also, the statement in the opinion that "If the consideration to be paid was to be paid in installments, the notice should have so stated and if the consideration was to be other than lawful money of the United States the notice should likewise have so stated" is clearly *dictum*. Whatever that notice stated, it was clear that it was not followed and any statements in the opinion of the Court of Appeals as to what it *should have* provided in order to be valid were necessarily *dictum*. Finally, and most importantly, Section 3440.1 does not require a statement in the notice describing the *nature* of the consideration for the chattel mortgage. All that is required is that the notice shows "the date and place where the purchase price [in the case of a sale] or consideration is to be paid". This clear language alone would make the statement in the *Bumb* case completely inconsistent with the governing state law. The *Bumb* case was properly decided on its own facts, which clearly indicate that the consideration for the loan secured by the chattel mortgage therein did not pass on the day specified, but was delivered over a period of time which commenced with that date. Also, in the *Bumb* case the chattel mortgage was recorded prematurely. However, to extend the effect of the decision therein far beyond the scope of the facts of the case would, as we have previously urged, do violence to the governing state law.

California Civil Code Section 3440.1 should not be construed so as to abrogate the generally accepted definition of "consideration". Nor should the statute be modified or supplemented by judicial decision adding requirements to the notice which clearly are not contained in the statute. Mortgagees and secured creditors are as much entitled to the protection of state law as are general creditors of the bankrupt. Violence to established state law should not be permitted for or against either group.[3]

The growing tendency of the Federal appellate courts to limit or disapprove interpretation of state law such as California Civil Code Section 3440.1 giving trustees in bankruptcy an opportunity to upset security transactions such as those involved herein even when they were carried out in conformity with accepted local practice is indicated in the recent decision of this Court in *Lewis, Trustee in Bankruptcy v. Manufacturers National Bank of Detroit*, 364 U. S. 603, which disapproves the troublesome doctrine of *Constance v. Harvey* (C. A. 2, N. Y.), 215 F. 2d 57.

We earnestly submit that the interests not only of the petitioner herein but of parties to financial transactions of this type in California, and because of the

---

[3]In its opinion the Court of Appeals made no reference to the rule of the case of *Stewart v. Leasure*, 12 Cal. App. 2d 652, which was cited and discussed in the briefs presented to it. That case holds that where a chattel mortgage is given to secure a loan *already made* the provisions of the California Bulk Sales Law do not apply. (12 Cal. App. 2d 652, 657-658.) Therefore, even if there had been no fresh consideration for the new promissory note secured by the chattel mortgage, so that "the consideration" did not pass on the date specified in the Notice of Intention, the transaction would still be a valid one and the chattel mortgage should have been upheld.

nationwide prevalence of bulk sales laws, in many other states, justify the granting of a Writ of Certiorari herein and a review of the decision of the Court below, so that this critical question can be resolved.

Wherefore, petitioner prays that a Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

By J. Robert Arkush,
Basic Industries, Inc., Petitioner,
Counsel for Petitioner.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

Basic Tool Industries, Inc., Appellant, vs. C. Douglas Wikle, Trustee, Appellee. No. 17,264. Dec. 6, 1961.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Hamlin, Circuit Judges, and Solomon, District Judge.

Hamlin, Circuit Judge:

Basic Tool Industries, Inc., appellant herein, appeals to this court from an order of the United States District Court for the Southern District of California, Central Division, affirming an order of a referee in bankruptcy which determined that appellant's chattel mortgage was void as against the trustee in bankruptcy. This court has jurisdiction under the provisions of 11 U.S.C.A. §47 and 28 U.S.C.A. § 1291.

The facts in the case are generally undisputed. On August 22, 1958, a petition in bankruptcy was filed against Jet Air-Age, Inc., hereinafter called the bankrupt. Prior to that time the bankrupt was engaged in the machine shop business in Gardena, California. Among the bankrupt's assets taken into possession by the trustee in bankruptcy were various items of machinery, equipment, fixtures, etc., which were the subject of and described in a chattel mortgage in favor of appellant.

During the period from February 19, 1958, to August 5, 1958, appellant made various loans to the bankrupt at the times and in the amounts set out in the margin.[1]

Certain of the referee's findings of fact and conclusions of law adopted by the district court were as follows:

"V.

"The advances made prior to March 28, 1958, as above referred to, were originally evidenced by demand notes executed by the bankrupt. The chattel mortgage transaction herein referred to was consummated by means of an escrow held at the office of Harold Easton, 416 West Eighth Street, Los Angeles, California. As part of the escrow transaction, the bankrupt's new note dated March 28, 1958, in the sum of $25,000.00, was substituted for its previous notes representing the advances of February 19, 1958, February 20, 1958, March 7, 1958, and March 14, 1958, which said advances also totaled $25,000.00. It was never the intention of the parties to have the chattel mortgage secure the advance of March 21, 1958. Except for said advance of March 21, 1958, it was the intention of the parties that said chattel mortgage was to secure

[1]

Dates	Amounts
February 19, 1958	$ 500.00
February 20, 1958	500.00
March 7, 1958	500.00
March 14, 1958	23,500.00
March 21, 1958	5,000.00
March 28, 1958	5,000.00
March 28, 1958	5,000.00
June 9, 1958	10,000.00
June 12, 1958	4,700.00
June 20, 1958	3,300.00
August 5, 1958	3,000.00

all advances made by Basic Tool Industries, Inc. to the bankrupt, but not to exceed the maximum indebtedness as set forth in the said chattel mortgage.

"VI.

"A notice of intended chattel mortgage, as required by Section 3440.1[2] of the California Civil Code, was published and recorded within the times set forth in said section. Said notice recited that the mortgage would be delivered and the consideration therefor paid at 10:00 o'clock A.M. on the 28th day of March, 1958, at the office of Harold Easton at 416 West Eighth Street in the City of Los Angeles, County of Los Angeles, State of California.' As above found, with the exception of a total of $10,000.00 advanced to the bankrupt on March 28, 1958, all of the advances for which the chattel mortgage was security were made prior to and after March 28, 1958. The total of $10,000.00 advanced on March 28, 1958, was delivered over to

---

[2]The pertinent provisions of California Civil Code §3440.1 are:

". . . [T]he sale, transfer, assignment or mortgage of the fixtures or store equipment of a . . . machinist . . . is conclusively presumed fraudulent and void as against existing creditors of the . . . mortgagor, unless before the consummation of the . . . mortgage, . . . the mortgagor . . . or mortgagee does all of the following:

(a) Records at least ten days before the consummation of the . . . mortgage . . . a notice of the intended . . . mortgage which states the name and address of the intended . . . mortgagor and the name and addresses of the intended . . . mortgagee. The notice shall contain a general statement of the character of the merchandise or property intended to be sold, assigned, transferred or mortgaged, and show the date and place where the purchase price or consideration is to be paid."

the bankrupt at approximately 10:15 or 10:30 A.M. on March 28, 1958, and not at 10:00 A.M. as set forth in the notice.[3]

* * * * *

"Conclusions of Law

"I.

"The consideration of the chattel mortgage executed by the bankrupt in favor of Basic Tool Industries, Inc. was the advances or loans made by said Basic Tool Industries, Inc. over a period of time commencing February 19, 1958 and ending August 5, 1958. There was a failure, therefore, to comply with the notice requirements of Section 3440.1 of the California Civil Code. Accordingly, said chattel mortgage is invalid as against creditors of the bankrupt whose claims arose prior to recordation of the said mortgage on March 28, 1958, under said Section 3440.1."

Section 70e of the Bankruptcy Act, 11 U.S.C.A. §110e, provides in part:

"(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor."

It was undisputed that there were a number of the bankrupt's creditors who had provable claims which arose

[3]We do not base our decision on the claimed variance (from 10 a.m. to 10:15 a.m. or 10:30 a.m.) in time of delivery of the $10,000.

before March 28, 1958, the date of the filing of the petition in bankruptcy. Furthermore, failure to comply with the "bulk sales" notice provisions of section 3440.1 of the California Civil Code[4] renders a chattel mortgage invalid against creditors of the mortgagor whose claims arose before recordation. *Bumb v. United States*, 276 F. 2d 729 (9th Cir. 1960); *Mitchell v. Selzler*, 84 Cal. App. 2d 716, 191 P. 2d 523 (1948). Cf. *In re Sassard & Kimball*, 45 F. 2d 449 (9th Cir.), *rev'd sub. nom. Moore v. Bay*, 284 U.S. 4 (1931). Thus, the referee on the basis of his findings, concluded that the chattel mortgage was invalid as against the trustee in bankruptcy under the provisions of section 70c of the Bankruptcy Act, 11 U.S.C.A. § 110c.[5]

In holding the chattel mortgage in question invalid, the referee and the district court apparently relied upon the decision of this court in *Bumb v. United States, supra*. The facts in that case established that there was a note executed for $10,000.00 secured by a chattel mortgage. The notice of intended mortgage under section 3440.1 provided that the consideration for the mortgage would be paid on November 21, 1956. On that day only a portion—$5,850—of the consideration was paid. The balance was paid in two installments, $2,150

---

[4]See note 2 supra.

[5]The referee also concluded that the chattel mortgage was invalid under §70c of the Bankruptcy Act, 11 U. S. C. A. §110c; however, the appellee does not urge affirmance of this conclusion in view of the Supreme Court's recent decision in *Lewis v. Manufacturers National Bank of Detroit*, 364 U.S. 603 (1961).

on December 28, 1956, and $2,000 on January 4, 1957. In holding that the chattel mortgage was invalid because there was a substantial deviation in the manner of payment of the consideration from the mode set forth in the notice of intended chattel morgage, the court said:

> "The object of the statute is: (1) to furnish creditors of the intended mortgagor the period of at least ten days within which to levy attachment or execution on the property to be mortgaged, and (2) to garnish or levy on the proceeds of the mortgage in the event provision is not made for the payment of the claims presented.
>
> "Appellee contends that the payment of the consideration was substantially in accordance with the recorded notice. We cannot agree with such contention. The notice stated that the consideration for said chattel mortgage is to be paid on the 21st day of November, 1956. The undisputed fact is that only 58½ per cent of the consideration to be paid was paid on that date. 21½ per cent of the consideration was paid 37 days later by government warrant made payable jointly to the mortgagor and one of its creditors. 20 per cent of the consideration was paid 44 days late. Appellee argues that the recorded notice did not represent that the entire $10,000 would be paid on November 21, 1956, nor did it specify the kind or amount of consideration to be paid. It is undisputed that the consideration to be paid for the chattel mortgage was $10,000. The notice stated that the consideration would be paid on the 21st day of November, 1956. The only reasonable interpretation which can be placed on the notice is that the

> entire consideration to be paid would be paid in lawful money of the United States on November 21, 1956. If the consideration to be paid was to be paid in installments the notice should have so stated, and if the consideration was to be other than lawful money of the United States the notice should likewise have so stated."[6]

The facts in the instant case are strikingly similar to those in the *Bumb* case. Here the chattel mortgage provided that it was security for a promissory note of $25,000 and future advances of up to $50,000. The notice of intended mortgage stated that the consideration would be paid on March 28, 1958. However, in fact the $25,000 was not transferred on the specified date. The bankrupt did not receive $25,000 in cash on that day; rather, it received only $10,000 in cash and the return of four unsecured notes totaling $25,000. Thus, the consideration was not paid in the manner and mode set out in the notice of intended chattel mortgage.

Appellant further contends that the chattel mortgage was valid as to the $10,000 transferred to the bankrupt on the date specified for the transfer of the consideration of the mortgage in the notice of intended chattel mortgage. This contention is also disposed of by the *Bumb* case. In *Bumb* 58½% of the $10,000 consideration was transferred in accordance with the notice of intended chattel mortgage; yet the mortgage was held wholly void rather than valid as to $5,850. Similarly

---

[6]276 F.2d at 734-735.

in this case we hold the mortgage wholly void rather than valid as to the $10,000.

The purpose of section 3440.1 is to protect creditors. *Bumb v. United States, supra; Jeffery v. Volberg*, 159 Cal. App. 2d 815, 324 P. 2d 964 (1958). In accordance with the holding in *Bumb v. United States, supra*, we hold that there was not a proper compliance with the provisions of section 3440.1.

The judgment of the district court is affirmed.

(Endorsed) Opinion Filed Dec. 6, 1961.

Frank H. Schmid, Clerk.

APPENDIX "B."

Judgment.

Basic Tool Industries, Inc., Appellant, vs. C. Douglas Wikle, Trustee, Appellee. No. 17264.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court Cause be, and hereby is affirmed.

Filed and entered Dec. 6, 1961.

APPENDIX "C."

Notice of Intended Mortgage Under Section 3440 Civil Code of the State of California.

Notice is Hereby Given:

Tht Jet Air-Age, Inc., Mortgagor, whose address is 1559 West 135th Street, in the City of Gardena, County of Los Angeles, State of California, intends to mortgage to Basic Tool Industries, Inc., Mortgagee, whose address is 14439 South Avalon Blvd., in the City of Gardena, County of Los Angeles, State of California, the following described personal property, to-wit:

All, machinery and equipment of mortgagor located at 1559 West 135th Street, Gardena, California of a certain machine shop business known as Jet Air-Age, Inc., and located at 1559 West 135th Street, in the City of Gardena, County of Los Angeles, State of California, and that an executed mortgage of the same will be delivered and the consideration therefor paid at 10 o'clock A.M., on the 28th day of March, 1958, at the office of Harold Easton at 416 West 8th Street in the City of Los Angeles, County of Los Angeles, State of California.

Dated March 15, 1958.

Jet Air-Age, Inc.

By Lee C. Smith, Pres.

Mortgagor.

Basic Tool Industries, Inc.

By Robert Gene Lucas, Secy.

Mortgagee,

II—O/S-5688

Pub. Mar. 21, '58—1 Fri.

[Endorsed]: Filed Oct. 26, 1960.

APPENDIX "D."

Mortgage of Chattels.

This Mortgage, made this 28th day of March, 1958, by Jet Air-Age, Inc., a California corporation of Gardena County of Los Angeles, State of California, Mortgagor, to Basic Tool Industries, Inc., a California corporation of County of Los Angeles, State of California, Mortgagee, Witnesseth: That the Mortgagor mortgages to the Mortgagee all that certain personal property situated and described as follows, to-wit:

All machinery and equipment of mortgagor currently located at 1559 West 135th Street, Gardena, California, and more particularly described in the inventory attached hereto, marked Exhibit "A" and made a part hereof.

Document No. ..... recorded at Request of: Recording requested by Mortgagee, Mar. 28, 2:31 P.M. '58.

Official Records Ray E. Lee, Recorder, Los Angeles County, Calif.

as security for the payment of Mortgagee of the sum of Twenty-five thousand dollars $25,000.00 Dollars according to the terms and conditions of a certain Promissory Note of even date herewith substantially in form of Exhibit "B" attached hereto and made a part hereof

[Paragraph Omitted.]

This mortgage also secures: (a) any and all renewals of said promissory note; (b) repayment of all sums and amounts that may be necessarily advanced or expended by Mortgagee for the maintenance or preservation of the mortgaged property, or any part thereof; (c) to the maximum extent and amount of Fifty Thousand Dollars ($50,000.00), any and all other sums

that may hereafter be advanced by Mortgagee to or for the benefit of Mortgagor, any and all other expenditures that may hereafter be made by Mortgagee pursuant to the provisions hereof or for the benefit of or at the instance of Mortgagor, and any and all other indebtednesses and obligations of Mortgagor to Mortgagee that may hereafter be incurred.

Said mortgagor promises that he will, during the continuance hereof, keep the mortgaged property in good condition and repair; and further that he will not remove, nor permit to be removed, any part of said property from the above premises without the written consent of the Mortgagee first had and obtained; and further that he will provide, maintain and deliver to Mortgagee satisfactory fire and other insurance policies covering said property in amounts and companies satisfactory to Mortgagee and with loss, if any, payable to the Mortgagee, as his interest may appear.

The said mortgagor hereby declares and warrants to the mortgagee that he is the absolute and sole owner, and is in possession, of all said mortgaged property, and that the same is free and clear of all lines, encumbrances and adverse claims.

It is further agreed that, if said mortgagor shall fail to make payment of any part of the principal or interest as provided in said promissory note at the time and in the manner therein specified, or if any breach be made of any obligation or promise of the said mortgagor herein contained or secured hereby, then the whole principal sum unpaid on said promissory note, with interest accrued thereon, shall immediately become due and payable, at the option of mortgagee; and the said

mortgage may at once proceed to foreclosure this mortgage according to law; or the said mortgagee may, at his option, and he is hereby empowered so to do, enter upon the premises where the said mortgaged property may be and take possession thereof, and remove, sell and dispose of the same, and from the proceeds of sale retain all costs and charges incurred by him in the taking or sale of said property, [illegible] Attorney's fees thereby incurred, also, he may take all sums due him on said promissory [illegible] hereof, including reasonable attorney's fees; and any surplus of such proceeds remain- [illegible] mortgagor.

In this Mortgage, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number the plural.

In Witness Whereof, the Mortgagor has executed this instrument.

[Seal]

JET AIR-AGE, INC.,
By LEE C. SMITH, Pres.
MRS. LEE C. SMITH, Sec,

On March 14, 1958 the undersigned, a Notary Public in and for said County and personally appeared Lee C. Smith known to me to be the President, and Mrs. Lee C. Smith, known to me to be Secretary of a corporation that executed the within Instrument, known to me to be a person who executed the within Instrument on behalf of the Corporation [illegible] and acknowledged to me that such Corporation executed the within Instrument pursuant to its by-laws or a resolution of its [illegible] directors.

Witness my hand and official seal.

[Seal]

SANFORD A. CAHN,

Notary Public in and for said County and State.

My Commission Expires Feb. 28, 1959.

~~Do Not Record.~~

When Recorded, Please Mail to Harold Easton, 416 West 8th Street, Los Angeles 14, California.

LIBRARY
SUPREME COURT, U. S.

FILED
APR 19 1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 598

Mary Tom Investment, Inc.,

Petitioner,

vs.

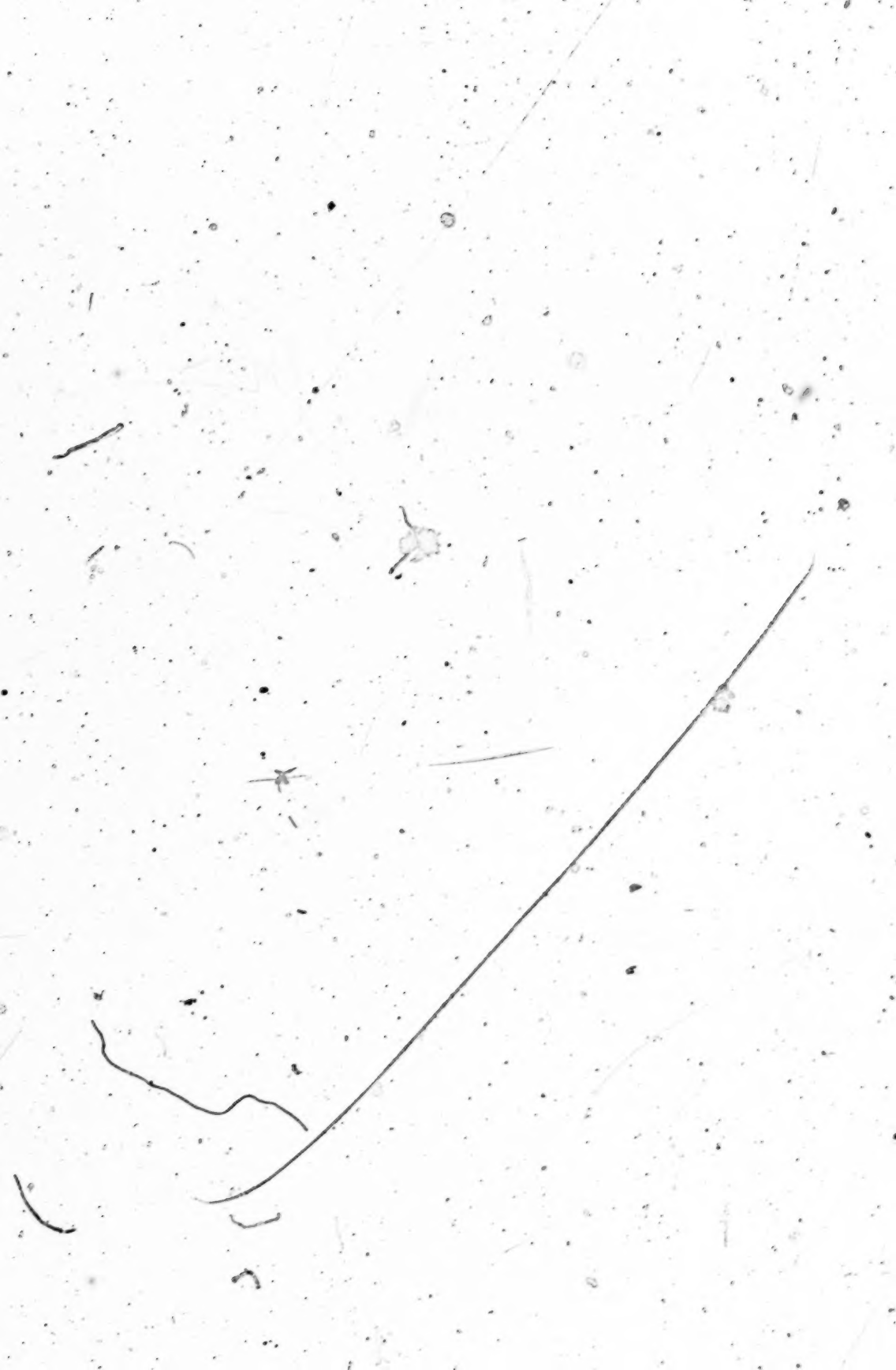
C. Dewitt Wiley, Trustee,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN SUPPORT OF OPPOSITION

Dillon F. Gilbert,
120 South Spring Street,
Los Angeles 12, California,
Counsel for Respondent.



SUBJECT INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Statutes involved	2
Question presented	3
Statement	3
Argument	6
There is no federal question presented. Only a question of construction of a California statute is involved, and it was properly decided by all the courts below	6
Conclusion	9

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bumb v. United States, 276 F. 2d 729	5, 6, 7, 8
Dawson v. Bank of America, 100 Cal. App. 2d 305	6
Kellogg v. Curry, 101 Cal. App. 2d 856	6
Lewis v. Manufacturers Nat. Bank, 364 U. S. 603	8, 9
Mitchell v. Setzler, 84 Cal. App. 2d 716	5, 6, 7
Moore v. Bay, 284 U. S. 4	5
Sassard & Kimball, In re, 45 F. 2d 449	5
Stewart v. Leasure, 12 Cal. App. 2d 652	7, 8

STATUTES	
Bankruptcy Act, Sec. 24c	2
Bankruptcy Act, Sec. 70c	8, 9
Bankruptcy Act, Sec. 70e(1)	3, 5, 7, 9
California Civil Code, Sec. 3440.1	2, 3, 4, 5, 6, 7, 8
United States Code, Title 11, Sec. 47c	2
United States Code, Title 11, Sec. 110c	8
United States Code, Title 11, Sec. 110e(1)	3, 5, 7
United States Code, Title 28, Sec. 1254(1)	2
United States Senate Bill 1229	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

BASIC TOOL INDUSTRIES, INC.,

Petitioner,

vs.

C. DOUGLAS WIKLE, Trustee,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION.

Opinions Below.

The memorandum opinion of the Referee in Bankruptcy, and his Findings of Fact, Conclusions of Law and Order, are unreported, but appear at pages 25-30 of the Record.[1] The District Court for the Southern District of California did not render a written opinion; its Order affirming the Referee in Bankruptcy is unreported, but appears at pages 38-39 of the Record. The opinion of the Court of Appeals for the Ninth Circuit is reported at 298 F. 2d 129.

---

[1]All citations to the "Record" refer to the Transcript of Record in the Court of Appeals.

Jurisdiction.

The judgment of the Court of Appeals was entered December 6, 1961. A petition for rehearing was denied on January 23, 1962. The petition for certiorari was filed on April 20, 1962. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1) and Section 24c of the Bankruptcy Act, 11 U. S. C., Sec. 47c.

Statutes Involved.

1. *California Civil Code, Sec. 3440.1:*

> ". . . the sale, transfer, assignment, or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, cleaner and dyer, or retail or wholesale merchant, is conclusively presumed fraudulent and void as against the existing creditors of the vendor, transferor, assignor, or mortgagor, unless before the consummation of the sale, transfer, assignment, or mortgage, the vendor, transferor, assignor, or mortgagor, or the intended vendee, transferee, assignee, or mortgagee does all of the following:
>
> "(a) Records at least 10 days before the consummation of the sale, transfer, assignment, or mortgage . . . a notice of the intended sale, transfer, assignment, or mortgage, which states the name and address of the intended vendor, transferor, assignor, or mortgagor and the name and address of the intended vendee, transferee, assignee, or mortgagee. The notice shall contain a general statement of the character of the merchandise or property intended to be sold, assigned,

transferred, or mortgaged, and show the date and place where the purchase price or consideration is to be paid.

"(b) Publishes a copy of the notice. . . ."

2. *Bankruptcy Act, Sec. 70e(1), 11 U. S. C., Sec. 110e(1):*

"A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor."

Question Presented.

Whether, as a matter of state law, there has been a proper or sufficient compliance with the requirements of Section 3440.1 of the California Civil Code in a case where the statutory notice recites that a mortgage will be delivered "and the consideration therefor paid" at a specified hour on a certain date, whereas in fact, most of the loans for which the mortgage was intended as security were made before and after the date set forth in the notice.

Statement.

Before the filing of the petition in bankruptcy on August 22, 1958, Jet Air-Age, Inc. was a machinist, engaged in the machine shop business in Gardena, California. [R. 27.] On February 19, 1958, petitioner made the first of a series of unsecured loans to the bankrupt, each being represented by a demand note.

By March 14, 1958, four advances had been made totaling $25,000. [R. 28.] At this point the parties agreed to put the borrowing on a secured basis. An escrow was opened at the office of petitioner's attorney for the purpose of effectuating a transaction whereby the bankrupt would chattel mortgage its machinery, equipment, fixtures and other personal property to secure the loans theretofore made and those to be made in the future, up to a specified maximum amount. [R. 27-28, 14-21.]

In connection with this transaction, a notice under Section 3440.1 of the California Civil Code was filed and published. It recited that the mortgage would be delivered "and the consideration therefor paid at 10:00 o'clock A.M., on the 28th day of March, 1958," at the attorney's office. [R. 29.]

Through the escrow, a new note for $25,000 was substituted for the previous four demand notes totaling the same amount. On March 28, 1958, the date specified in the notice, petitioner made two additional $5,000 loans to the bankrupt as part of the escrow arrangement. The escrow closed, the mortgage was delivered to petitioner, and the $10,000 turned over to the bankrupt at approximately 10:15 A.M. or 10:30 A.M. on March 28th, rather than at 10:00 A.M. as set forth in the notice. [R. 28-29.] Recordation of the mortgage occurred the same day. [R. 27.] Thereafter, at various times between June 9 and August 5, 1958, petitioner made four more loans to the bankrupt aggregating $21,000. [R. 28.]

In summary, of the total of $50,000 borrowed by the bankrupt for which petitioner claimed the mortgage as security, only $10,000 was advanced on March 28, 1958, the date specified in the notice.

There were in existence at the time of bankruptcy a number of the bankrupt's creditors having provable claims which arose prior to March 28, 1958. [R. 29.]

Under California law, a transaction which fails to comply properly with Section 3440.1 of the Civil Code is void as against the transferor's creditors whose claims antedate the defective transfer or mortgage. *Bumb v. United States*, 276 F. 2d 729 (C. A. 9, 1960); *Mitchell v. Setzler*, 84 Cal. App. 2d 716 (1948); *In re Sassard & Kimball*, 45 F. 2d 449 (C. A. 9, 1930), *rev'd sub nom. Moore v. Bay*, 284 U. S. 4 (1931). Respondent-trustee in bankruptcy, therefore, relied on the rights of those actual creditors and attacked petitioner's chattel mortgage under Section 70e(1) of the Bankruptcy Act, 11 U. S. C., Sec. 110e(1). The Referee in Bankruptcy ruled for respondent and declared the mortgage invalid. [R. 26-30.] On review and on the subsequent appeal, both the District Judge [R. 38-39] and the Court of Appeals for the Ninth Circuit affirmed.

ARGUMENT.

There Is No Federal Question Presented. Only a Question of Construction of a California Statute Is Involved, and It Was Properly Decided by All the Courts Below.

The petition for certiorari correctly admits that no federal question is presented. The only issue pertains to the technical construction of a state statute.

The purpose of California Civil Code, Section 3440.1 (commonly referred to as the "bulk sale" law) is to protect creditors of certain sellers or mortgagors in two ways: First, to give the creditors at least ten days' notice of an intended transfer so that they can levy on the physical property being transferred; and second, to afford them the alternative remedy of levying on the consideration for the transfer when the proceeds are received by the transferor. *Mitchell v. Setzler*, 84 Cal. App. 2d 716, 720 (1948); *Bumb v. United States*, 276 F. 2d 729, 734 (C. A. 9, 1960). The requirement that the statutory notice must set forth the date and place for the passage of the consideration relates to the second of these protections.

California follows the usual rule that an attachment, garnishment or execution on an asset reaches only the debtor's interest therein at the moment of levy, and not any after-acquired interest. *E.g., Dawson v. Bank of America*, 100 Cal. App. 2d 305 (1950); *cf. Kellogg v. Curry*, 101 Cal. App. 2d 856 (1951). Thus, a Section 3440.1 notice such as the one given by petitioner, which merely recites that the consideration will be paid on a specified date, adequately warns the transferor's creditors as to their second alternative remedy only if

the proceeds are in fact paid over at the time specified in the notice. Petitioner's loans for which the mortgage was intended as security were actually made for the most part either before or after the published date. The notice in this case therefore was misleading, for creditors who relied on it and who attempted to levy on the consideration for the transaction could not have caught any money previously or subsequently advanced by petitioner to its borrower.

For this reason, the mortgage was invalid as against the mortgagor's creditors whose claims antedated the transaction, and as against respondent-trustee in bankruptcy who derives the rights of those actual creditors under Section 70e(1) of the Bankruptcy Act, 11 U. S. C. Sec. 110e(1). The court below merely followed its previous decision in *Bumb v. United States*, 276 F. 2d 729 (C. A. 9, 1960), and the reasoning of the state court in *Mitchell v. Setzler*, 84 Cal. App. 2d 716 (1948).[2] No California case is to the contrary. *Stewart v. Leasure*, 12 Cal. App. 2d 652 (1936), cited by petitioner for the proposition that Section 3440.1

---

[2]Petitioner's argument that a mortgage may be validly given in California for consideration other than a contemporaneous cash payment (Pet. pp. 7-9) is beside the point. Civil Code Section 3440.1 does not prohibit the giving of mortgages to secure antecedent, present, or future loans, or for non-cash consideration; it is only a notice statute. But if the consideration is not cash, or if it is to be paid on a date either before or after the delivery of the mortgage, the notice must be accurate and cannot erroneously set forth or imply that cash proceeds will be passed concurrently. This is all that the court below has held in its decisions in *Bumb v. United States* and in the present case.

does not apply where the consideration consists of an antecedent indebtedness (Pet. p. 12, n.3), is readily distinguishable. It was decided at a time when the statute contained different language.[3]

Certiorari should be denied in this case not only because there is a lack of a federal question, and the state law was correctly construed, but also because amendment of Section 3440.1 at the 1961 session of the California Legislature renders the point involved here of even less importance. There are as yet no judicial decisions interpreting the meaning of the bulk sales law in fact situations arising after September 15, 1961, the effective date of the new statute.[4]

Finally, *Lewis v. Manufacturers Nat. Bank*, 364 U. S. 603 (1961), referred to by petitioner (Pet. p. 12), is not in point. It involved only a construction of Section 70c of the Bankruptcy Act, 11 U. S. C. Sec. 110c, whereunder the trustee in bankruptcy may assert rights of an ideal, hypothetical creditor. In the

---

[3]The bulk sale statute applicable in 1936 in *Stewart v. Leasure* provided that the notice must contain the date when and "the place where the purchase price or consideration, *if any there be*, is to be paid." A subsequent amendment eliminated the italicized phrase before the time that *Bumb v. United States* was decided.

[4]Senate Bill 1229, enacted effective September 15, 1961, eliminated "machinists" from the categories of persons required to comply with Civil Code, Section 3440.1. Thus, in future cases involving facts similar to those here presented, the bulk sales law will not apply at all. Moreover, the statute was amended by the same bill so as to permit the notice to recite that the consideration or purchase price will be paid "on or after" a specified date.

present case, on the other hand, the existence of actual creditors enabled respondent to rely on Section 70e(1) of the Act, and the court below correctly grounded its decision on this provision.[5]

Conclusion.

For the foregoing reasons, it is submitted that the petition for certiorari should be denied.

Respectfully submitted.

FRANCIS F. QUITTNER,
Attorney for Respondent.

QUITTNER, STUTMAN & TREISTER,
GEORGE M. TREISTER,
Of Counsel.

---

[5]Before this Court's decision in *Lewis v. Manufacturers Nat. Bank* was announced, respondent had relied on Section 70e of the Bankruptcy Act as well as Section 70e(1). The Referee in Bankruptcy and the District Judge held petitioner's mortgage void under both sections. *Lewis* was decided, however, prior to the time the appeal was taken, and respondent accordingly abandoned his Section 70e theory. As a result, the Court of Appeals relied only on Section 70e(1), and, indeed, petitioner does not now question the application of 70e(1) if the state law was properly interpreted.